

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NEW ENGLAND

)	
IN THE MATTER OF)	
)	DOCKET NO. 11-001
Germain R. Bourdeau)	
Pleasant Acre Farms, LLC)	FINDINGS OF VIOLATION
Swanton, Vermont)	
)	and
Proceeding under Section 309(a))	
of the Clean Water Act 33 U.S.C.)	
33 U.S.C. ' 1319(a))	ORDER FOR COMPLIANCE

The following Findings are made and Order issued pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(a) of the Clean Water Act (the "Act"), 33 U.S.C. § 1319(a). This authority has been delegated to EPA's Regional Administrator, and further delegated to the Director of the Office of Environmental Stewardship, EPA, Region 1.

I. FINDINGS OF FACT AND VIOLATION

1. Germain Bourdeau is an individual and owner of Pleasant Acre Farms, LLC which has a principle address located at 194 County Road, in Swanton, Vermont. Mr. Bourdeau is a "person" under Section 502(5) of the Act, 33 U.S.C. § 1362(5).

2. Pleasant Acre Farms, LLC is made up of a number of different farms and tracts of land. The wetlands that are the

subject of this Order are located within Farm number 2439, Tract 153 and are located off of County Road, Swanton, VT. The portion of the wetlands within Tract 153 that were affected by the activities described below are located in Field UN2 (the "Site") (see Attachment 1, NRCS Site map).

3. Prior to the alterations described below, the wetlands in Field UN2 were forested, and were part of a large undisturbed forested wetland complex (the "Wetlands") that extends throughout much of Tract 153 and beyond.

4. In the Fall of 2006, Mr. Bourdeau or persons operating under his control, supervision, or authorization, undertook mechanized land clearing, grubbing, grading, and ditching/sidecasting activities to clear the woody hydrophytic vegetation and drain the wetlands at the Site, thereby discharging soil and rocks (the "Dredged and Fill Materials") into approximately 3.0 acres of wetlands (the "Affected Wetlands"). The purpose of the work was to create more farmland for crop production.

5. The Wetlands, including the Affected Wetlands were, before the activities described above, and remain, "wetlands" as defined at 40 C.F.R. §§ 232.2 and 122.2.

6. The Wetlands are adjacent to an unnamed stream, which flows north into the Missisquoi River, which in turn flows to

Lake Champlain. The Wetlands, the unnamed stream, the Missisquoi River and Lake Champlain are all "waters of the United States" under the definitions set forth in 40 C.F.R. §§ 122.2 and 232.2, and therefore are "navigable waters" under Section 502(7) of the Act, 33 U.S.C. § 1362(7).

7. The Dredged and Fill Materials discharged into the Affected Wetlands, as described in paragraph 4 above, are "pollutants" under Section 502(6) of the Act, 33 U.S.C. § 1362(6).

8. Mr. Bourdeau and/or persons working under Mr. Bourdeau's control, supervision, or authorization used farm equipment such as excavators, bulldozers, and dump trucks (collectively "heavy equipment") to perform the activities that resulted in the discharge of Dredged and Fill Materials into the Affected Wetlands.

9. The heavy equipment used to discharge the Dredged and Fill Materials into the Affected Wetlands constitute "point sources" under Section 502(14) of the Act, 33 U.S.C. § 1362(14).

10. The placement of the Dredged and Fill Materials into the Affected Wetlands by use of the heavy equipment constitutes the "discharge of pollutants" under Section 502(12) of the Act, 33 U.S.C. § 1362(12).

11. Section 301(a) of the Act, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge pollutants from a point source into waters of the United States, except in compliance with, among other things, the terms and conditions of a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. § 1344.

12. At the time that the discharges into the Affected Wetlands occurred, Mr. Bourdeau had not applied for or received a permit authorizing such discharge under Section 404 of the Act. Moreover, no other provision of the Act authorized the discharge of pollutants into the Affected Wetlands at the Site.

13. As set forth in findings 1-12 above, discharges of pollutants (Dredged and Fill Materials) from point sources (excavator, bulldozer, and other heavy equipment) to waters of the U.S. (the Affected Wetlands) occurred without a permit or other authorization under the Clean Water Act in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

14. Each day that the Dredged and Fill Materials remain in the Affected Wetlands without authorization from a permit issued under Section 404 of the Act, 33 U.S.C. § 1344, constitutes an additional day of violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

15. The activities described in paragraph 4 above, have destroyed the vegetation and altered the hydrology of the Affected Wetlands.

16. Prior to the activities described in paragraph 4 above, the Affected Wetlands likely provided wildlife habitat for birds, mammals, amphibians, reptiles, and invertebrates. In addition, the Affected Wetlands likely provided sediment and nutrient retention functions. Mr. Bourdeau's activities at the Site eliminated or diminished these natural resource functions.

17. The natural resource functions described above that have been eliminated or diminished will not be restored without remedial action to successfully re-establish vegetated wetlands at the Site as described in the Order below.

II. ORDER

Based on the foregoing Findings of Fact and Violation, and pursuant to the authority of Sections 309(a)(3) and 309(a)(5)(A) of the Act, 33 U.S.C. §§ 1319(a)(3) and (a)(5)(A), EPA hereby orders Mr. Bourdeau to:

1. Make no further discharges of dredged and/or fill material into waters of the United States except as authorized by a valid permit issued by the U.S. Army Corps of Engineers ("Corps") pursuant to Section 404 of the Act, 33 U.S.C. § 1344 or

except in conjunction with carrying out the remedial steps ordered below.

2. Restore the 3.0 acres of Affected Wetlands in Field UN2, as shown on Attachment 1. Successful restoration requires the presence of 1) hydrology sufficient to support hydric soils and hydrophytic vegetation; 2) hydric soils; and 3) hydrophytic vegetation at an aerial density of at least 50% for trees and shrubs and 90% for ground cover after a 5 year period. The objective of the restoration is to restore and replace the lost ecological functions and values of the Affected Wetlands referenced in paragraph 16 above. The restoration shall be implemented consistent with the requirements of this Order and the approved restoration plan described below.

3. Hire a wetland scientist experienced in wetland restorations to prepare, and submit for EPA and Corps review and approval, a wetland restoration plan (the "Plan") for the Affected Wetlands. The Plan must be submitted to the addresses in paragraph 7 below, by December 17, 2010.

4. The Plan must be developed consistent with EPA's "General Guidelines for Wetland Restoration and Creation Projects" (Attachment 2) and must address the elements identified in paragraphs 4.a through 4.f below:

a. Identification, through the use of soil probes, of subsurface drainage (tiles) in the field where restoration work will be performed no later than May 1, 2011; and the disabling or removal of any drainage system, including tile drainage, that is found, prior to undertaking any restoration work and no later than May 7, 2011;

b. Creation of a pit and mound topography at the restoration site similar to the topography of the adjacent forested wetlands. An excavator or backhoe must be used in this effort to recreate the pre-existing pit and mound topography of the Site. This earth work must commence immediately upon completion of any drainage system disabling work, and must be completed no later than May 15, 2011;

c. Restoration of the ditched area that was excavated on the eastern side of the Affected Wetlands and any other ditches excavated for the wetland conversion, by filling in the areas using the side-casted material from the excavation to the extent possible. If necessary, soil that will support wetlands restoration shall be added to achieve the pre-disturbance grade. Backfilling activities must include soil compaction and be completed no later than May 15, 2011;

d. A seeding and planting plan, which must be implemented starting no later than June 1, 2011 and completed by

June 15, 2011. Native trees and shrubs representative of the adjacent undisturbed wetlands must be planted within the restoration area and be of sufficient quantity to promote re-growth of the site to its pre-construction vegetative conditions. Woody plantings must be at least 18 inches in height and have a minimum aerial coverage of 50% of the site. Prior to woody plantings, a wetland seed mixture must be broadcast throughout the site at a rate of 35 lbs per acre. Coarse woody debris, such as tree limbs and fallen trees, shall be collected from adjacent areas and scattered over approximately 3-5% of the restoration site. Irrigation of the planted material is highly advised, especially during any extended dry periods for the first growing season.

e. A plan to monitor the success of the restoration over a period of five (5) years commencing in the Fall of 2011. Monitoring must occur during the growing season to ensure that natural plant communities are re-establishing and that there is no further manipulation of soils, hydrology or vegetation necessary. The wetland scientist must prepare an annual monitoring report documenting the findings and provide a copy to the Corps and EPA. For the 5 year period following planting, the number of living woody plants must be estimated by the wetland scientist. If, after 2 years, the density of

healthy planted and regenerated trees and shrubs is less than 50% aerial coverage, additional planting sufficient to re-establish the 50% aerial coverage must occur the following spring (year 3). The cover of non-invasive herbaceous vegetation (grasses, ferns, herbs, etc.) must be evaluated each year until a stable herbaceous community is established. If after 2 years, ground cover is less than 90% aerial coverage, additional wetland seed sufficient to ensure 90% aerial coverage must be broadcast. Refer to section I.6 of the Corps of Engineers Compensatory Mitigation Guidance (attachment 3).

f. Invasive species on the site must be controlled. See sections I.4(f) of the Corps of Engineers Compensatory Mitigation Guidance on invasive species control for a list of common invasive species and common control measures (Attachment 4).

5. The Restoration Plan must be submitted to EPA and the Corps for review and approval at the address in paragraph 7. EPA will provide written notice of its approval of the Plan, approval with modifications required, or disapproval with modifications required. Any modifications to the Plan required by EPA must be addressed and the Plan resubmitted to EPA and the Corps for further review and approval, consistent with the

schedule established in EPA's written notice of modification or disapproval.

6. Complete all actions related to the Plan in accordance with the approved Plan, and consistent with the schedule described in paragraph 4 above, unless it can be demonstrated to EPA's satisfaction that weather constraints or other unpreventable occurrences prevented the work. If such demonstration is made, EPA will confirm in writing the revised final dates for completing remaining restoration actions, taking into account the delay justified by such constraints/occurrences.

7. Within fifteen (15) days of completing all restoration actions as required by the approved Plan, submit written notice and photographic evidence of the status of compliance with this Order. The notice shall be sent to the Agencies as listed below:

Denise Leonard
U.S. Environmental Protection Agency
Mail Code OES05-1
5 Post Office Square
Boston, Massachusetts 02109-3912

Marty Abair
U.S. Army Corps of Engineers
8 Carmichael St. Suite 205
Essex Junction, Vermont 05452

8. Photographs must be taken at the restoration site on an annual basis from at least two locations depicting the restored

wetlands during the same time of the growing season and from approximately the same photographic locations. A report with these photographs and a written discussion of the progress of the restoration shall be submitted by November 30th of each monitoring year to EPA and the Corps at the addresses listed above.

9. Non-compliance with any requirements of this Order must be reported to EPA within 2 weeks of the date of non-compliance. If non-compliance is reported, notification must include the following information:

- a. A description of the noncompliance;
- b. A description of any actions taken or proposed to be taken to comply with the requirements;
- c. A description of any factors which explain or mitigate the noncompliance; and,
- d. An approximate date by which the required action will be taken.

Providing notice of non-compliance shall not in and of itself excuse any non-compliance.

10. This Order is not a permit, and Mr. Bourdeau's liability under the Clean Water Act or any other federal, state or local law or regulation is not excused by compliance with the terms of this Order. Section 309(b) of the Act, 33 USC §

1319(b), and § 309(d) of the Act, 33 U.S.C. § 1319(d), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, et seq., the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, et seq., and the rule for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.1-19.4 (61 Fed. Reg. 69360, 69 (Dec. 31, 1996); 69 Fed. Reg 7121, 7 (Feb. 13, 2004)); 73 Fed. Reg 75,340, 5 (Dec. 11, 2008), authorize EPA to seek injunctive relief and civil penalties for a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), or of an Order issued pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a), in amounts of up to \$32,500 per day of violation between March 16, 2004 and January 12, 2009, and up to \$37,500 per day of violation after January 13, 2009. Section 309(g), 33 U.S.C. § 1319(g), as amended by the above referenced penalty adjustment statutes and regulations, authorizes EPA to seek administrative penalties of up to \$11,000 per day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), between March 16, 2004 and January 12, 2009, up to a maximum of \$157,500, and up to \$16,000 per day of violation, up to a maximum of \$177,500, for violations after January 13, 2009. Section 309(c)(1), 33 U.S.C. § 1319(c)(1), authorizes EPA to seek criminal fines and imprisonment for willful or negligent violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

11. This Order shall become effective upon receipt by Mr.
Bourdeau.

Susan Studlien, Director
Office of Environmental Stewardship
U.S. Environmental Protection Agency
Mail Code OES04-5
5 Post Office Square
Boston, Massachusetts 02109-3912

Dated: _____

Attachment 1: Site Map, Swanton, VT

Attachment 2: EPA General Guidelines for Wetland Restoration and
Creation Projects

Attachment 3: Section I.6 of the Corps of Engineers
Compensatory Mitigation Guidance

Attachment 4: Section I.4(f) of the Corps of Engineers
Compensatory Mitigation Guidance